SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 1

Questions presented 2

Statute involved 2

Statement 2

Specification of errors to be urged 9

Reasons for granting the writ 10

I.

The conflict of decision on question of judicial notice 10

II.

The commerce issue the conflicts of decisions 12

III.

The misapplication of the decisions of this court 13

IV.

The incompleteness of the record below 18

V.

The importance of the questions nationally 19

Conclusion 23

INDEX TO APPENDIX

PAGE

Relevant provisions of the Labor-Management Relations Act of 1947 (61 Stats. 136, 29 U. S. C., Sec. 141, et seq. (Supp., 1949)):

Section 2 1

Section 10(a) 1

Relevant provisions of the Administrative Procedure Act (60 Stats. 237, 5 U. S. C., Sec. 1005 et seq. (Supp., 1949)):

Section 8 5

Relevant provisions of the Rules and Regulations of the National Labor Relations Board, Series 5:

Section 203.46 6

Section 203.48 7

TABLE OF AUTHORITIES CITED

CASES	PAGE
Adams Motors, Inc., Matter of, 80 N. L. R. B. No. 1518	20
Allen W. Fleming Co., Matter of, 90 N. L. R. B. No. 118	19
Anders Motors Company, Inc., Matter of, 92 N. L. R. B. No. 124	20
Angelus Chevrolet Co., Matter of, 88 N. L. R. B. No. 174	19
Baxter Bros., Matter of, 91 N. L. R. B. No. 233	20
Belle-Wyman Co., Matter of, 79 N. L. R. B. No. 1424	20
Cadillac Automobile Co. of Boston, Matter of, 90 N. L. R. B. No. 85	19
Coulter Jones & Sons, Matter of, 89 N. L. R. B. No. 136	19
Dependable Motors, Matter of, 87 N. L. R. B. No. 193	19
Divide Creek Irrig. Dist. v. Hollingsworth, 72 F. 2d 859	10, 11
Dunlop Chevrolet, Matter of, 91 N. L. R. B. No. 172	19
Earl McMillan, Inc., Matter of, 90 N. L. R. B. No. 250	19
Earl Severin, Inc., Matter of, 90 N. L. R. B. No. 24	19
Fuller Automobile Co., Matter of, 88 N. L. R. B. No. 245	19
Gilbert & Siebel Motors, Matter of, 20 Cal. App. 232	19
Given Motors, Inc., Matter of, 87 N. L. R. B. No. 160	19
Grace Motor Sales, Matter of, 88 N. L. R. B. No. 90	19
Green Bay Auto Parts Co., Matter of, 91 N. L. R. B. No. 128	19
Harbor Chevrolet Co., Matter of (not reported)	20
Harry's Cadillac-Pontiac Co., Matter of, 81 N. L. R. B. No. 1	20
Heath, Bill, Matter of, 89 N. L. R. B. No. 12	19
Holbrook, Lawrence, Matter of, 80 N. L. R. B. No. 1679	20
Howell Chevrolet, Matter of, 89 N. L. R. B. No. 142	19
Hudson Sales Corporation, Matter of, 77 N. L. R. B. 378	5, 8, 15, 18

PAGE

Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88 ..... 13, 16, 17

Ivy-Russell Motor Co., Matter of, 90 N. L. R. B. No. 260 19

Jefferson Lincoln-Mercury, Matter of, 90 N. L. R. B. No. 284 19

Knapp Chevrolet Co., Matter of, 91 N. L. R. B. No. 217 20

Lewiston Buick Co., Matter of, 1 Cal. App. 498 19

Liddon-White Truck Co., Inc., Matter of, 76 N. L. R. B. No. 1181 20

Massachusetts Motor Car Co., Matter of, 90 N. L. R. B. No. 186 19

Master's Pontiac Co., Inc., Matter of, 88 N. L. R. B. No. 175 19

McConeca Motors, Matter of, 90 N. L. R. B. No. 202 19

National Labor Relations Board v. Foote Bros. Gear & Machine Corp., 311 U. S. 620 18

National Labor Relations Board v. Shawnee Milling Co., 184 F. 2d 57 ..... 12, 13

National Surety Co. v. United States, 29 F. 2d 92 11

Ohio Bell Telephone Co. v. Interstate Commerce Commission, 301 U. S. 292 ..... 13, 14, 16, 17

Paridy v. Caterpillar Tractor Company, 48 F. 2d 166; cert. den. 278 U. S. 617 11

Pasco Auto Co., Matter of, 87 N. L. R. B. No. 113 19

Polish National Alliance v. N. L. R. B., 322 U. S. 643 6

Port Angelus Automobile Dealers, Matter of, 91 N. L. R. B. No. 206 20

Public Motors, Matter of, 90 N. L. R. B. No. 273 20

Reesmyer Motor Co., Matter of, 88 N. L. R. B. No. 152 19

Rome Lincoln-Mercury Corp., Matter of, 86 N. L. R. B. No. 387 20

Rowan Motors Co., Matter of, 90 N. L. R. B. No. 156 20

PAGE

Rowan Motors Co., Matter of, 90 N. L. R. B. No. 186 20
Sheeley Motor Sales, Matter of, 89 N. L. R. B. No. 184 20
Strickler Motors, Matter of, 87 N. L. R. B. No. 113 19
Taylor, Jack, Matter of, 85 N. L. R. B. No. 1336 20
Teague Motor Co., Matter of, 91 N. L. R. B. No. 177 20
Tuscaloosa Lincoln-Mercury Co., Matter of, 92 N. L. R. B. No. 132 20
Tuscaloosa Truck & Tractor Co., Matter of, 92 N. L. R. B. No. 133 20
United States v. Abilene & Southern R. Co., 265 U. S. 274 13
University Motors, Matter of, 89 N. L. R. B. No. 146 20
Watts Motor Co., Matter of, 87 N. L. R. B. No. 23 19
Williams Motor Car Company v. N. L. R. B., 128 F. 2d 960 ..... 6, 7
Wray Bros., Matter of (not reported) 20

STATUTES

Administrative Procedure Act, Sec. 8 ..... 21, 22
Labor-Management Relations Act of 1947:
Sec. 2(6) 3, 5
Sec. 2(7) 3, 5
Sec. 9(d) 8, 18
Sec. 10(c) 3, 4, 5, 8, 11, 21, 22
Sec. 10(d) 23
Sec. 10(e) 6
Rules and Regulations of the National Labor Relations Board, (12 F. R. 5656, 5662; 13 F. R. 4872) 3
Rules and Regulations of the National Labor Relations Board, Series 5, Sec. 203.46 ..... 3, 4, 5, 8, 11, 21, 22
Rules and Regulations of the National Labor Relations Board, Series 5, Sec. 203.48 3

PAGE

United States Code, Title 5, Sec. 1005, Supp., 1949 (60 Stats. 237) 4

United States Code, Title 29, Sec. 152(6), (7), Supp., 1949 61 Stats. 136) 3

United States Code, Title 29, Sec. 159(d) (Supp., 1949) 8, 18

United States Code, Title 29, Sec. 160(c), Supp., 1949 (61 Stats. 135) 3, 6, 17

United States Code, Title 29, Sec. 160(d) (Supp., 1949) 23

United States Code Annotated, Title 28, Sec. 1251(1) 1

TEXTBOOKS

14 Federal Regulations 78, Sec. 102.46 3

14 Federal Regulations 78, Sec. 102.48 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

M. L. TOWNSEND,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

M. L. TOWNSEND, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 22, 1950.

Opinions Below.

The Order of the National Labor Relations Board [R. 88] was issued on May 12, 1949, and is not reported. The Opinion of the Court of Appeals [R. 100] is reported in 185 F. 2d 378.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 22, 1950. [R. 107.] The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1251(1).

Questions Presented.

1. Whether or not the National Labor Relations Board can take judicial notice of a case, in which petitioner was not a party, without a request to do so, and if it can has it properly and legally taken judicial notice in the instant matter.

2. Whether the Labor Management Relations Act of 1947 is applicable to franchised retail automobile dealers who buy and sell all of their merchandise within the boundaries of the State of California.

3. Whether the Circuit Court of Appeals may decide a case such as here presented without having the full record before it, as the statute requires.

4. Whether the National Labor Relations Board is conclusively bound by the Intermediate Report of its Trial Examiner when no exceptions to such report are filed by the General Counsel within the time allowed by the statute or extended by the National Labor Relations Board.

5. Whether the National Labor Relations Board has afforded petitioner the requisite due process of law.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, pages 1 to 7.

Statement.

Upon charges filed by the Initernational Association of Machinists, a Labor Organization, the National Labor Relations Board, by its General Counsel, issued a complaint against petitioner. The complaint was heard before a Trial Examiner, duly appointed by the National Labor Relations Board. During the course of such hearing the Trial Examiner pointed out to the General Coun-

sel the latter's failure to show the origination of certain purchases of new Hudson automobiles and the possible result that such failure might lead to the dismissal of the cases for want of proven jurisdiction of the National Labor Relations Board. [R. 37-42.] The hearing was concluded without the General Counsel offering proof on these points, and the Trial Examiner stated he would not go beyond the scope of the transcript of the hearing to determine the question presented. [R. 39.]

After the cause had been submitted to the Trial Examiner, he thereafter issued his Intermdiatee Report and Recommendations, on October 27, 1948 [R. 44-50], in which he held that because of the failure of the General Counsel to adduce evidence with respect to the originations of the new Hudson automobiles, the evidence in the record, was not sufficient to warrant a finding that petitioner was engaged in business operations affecting commerce within the meaning of Section 2(6) and (7) of the Labor-Management Relations Act of 1947[1] [R. 49.] The Trial Examiner, therefore, recommended that the complaint be dismissed *in toto*. [R. 49-50.] He further recommended that in the event no statement of exceptions to his Intermediate Report and Recommendations was filed as provided in Section 10(c) of the Labor-Management Relations Act of 1947[2] and the Rules and Regulations of the National Labor Relations Board Section 203.46 and 203.48 (the rules are printed in the appendix)[3]

---

[1]61 Stat. 136, 29 U. S. C. S. 152(6) (7) (Supp. 1949).

[2]61 Stat. 135, *et seq.*, 29 U. S. C. 160(c) (Supp. 1949).

[3]Rules and Regulations of N.L.R.B. as amended August 18, 1948 (12 F. R. 5656, 5662, 13 F. R. 4872; redesignated as sections 102.46 and 102.48 in 14 F. R. 78).

his findings, conclusions and recommendations be adopted by the National Labor Relations Board and become its findings, conclusions and order all in conformity with Section 10(c) of the Labor-Management Relations Act of 1947 and the Administrative Procedure Act.[4] [R. 50.]

Subsequent to the issuance of the Intermediate Report and Recommendations, the General Counsel of the National Labor Relations Board filed with that Board a motion to reopen the record and remand the cause to the Trial Examiner to permit the adducing of the omitted evidence and for a redetermination of the applicability of the Labor-Management Relations Act of 1947 to petitioner. [R. 52-54.] A similar motion was filed with the National Labor Relations Board by the International Association of Machinists, the charging union involved. [R. 54-56.] Petitioner filed with the Board his statement in opposition to both motions, specifically raising the question of the Board's jurisdiction over petitioner not only because of the deficiency in the evidence but also upon the grounds that petitioner's business was local in character and did not affect commerce substantially. [R. 57-62.]

Both the General Counsel and the charging union requested and were granted on five different occasions, extensions of time within which to file exceptions to the Intermediate Report of the Trial Examiner, but none were ever filed. [R. 54, 62, 63, 64.]

On February 16, 1949, the National Labor Relations Board stated that neither the General Counsel nor the charging union had shown sufficient cause to warrant reopening the record to adduce evidence concerning the busi-

---

[4]60 Stat. 237, 5 U. S. C. S. 1005, *et seq.* (Supp. 1949).

ness operations of Hudson Sales Corporation, the source of petitioner's new automobile purchases (see above) and denied their respective motions. [R. 65.] The Board, summarily held that even though these parties had not shown good cause to be permitted to adduce such additional evidence, the Board would erase this deficiency by taking judicial notice of a prior proceeding before the Board, in which it had asserted jurisdiction over the Hudson Sales Corporation,[5] and that because of its findings in this prior case is would hold that petitioner's business affected commerce within the meaning of Section 2(6) and (7) of the Labor-Management Relations Act of 1947, *supra*. None of the parties had requested the Board to take judicial notice of that case and the action of the Board was contrary to Section 10(c), *supra*, nor was petitioner a party to such prior case and was not confronted with it during the course of the hearing. [R. 65-67.]

The National Labor Relations Board then entered its order in which it found that petitioner's business affected commerce and remanded the cause to the Trial Examiner to make further findings with respect to the alleged unfair labor practices. The Board did not, however, permit the Trial Examiner to make independent findings with respect to the application of the Act to petitioner's business. [R. 65-67.] In this he was foreclosed by the summary and unrequested action of the Board.

Thereafter, pursuant to said directions, the Trial Examiner, on April 6, 1949, issued a Supplemental Intermediate Report [R. 68-88] but did not set aside his original finding of the lack of jurisdiction nor did he expressly adopt the summary findings of the Board. Rather he

---

[5]Matter of Hudson Sales Corporation, 77 N. L. R. B. 378.

adhered to his prior conclusions, even though he felt bound by the action of the Board on the jurisdictional questions. [R. 69.]

No statement of exceptions was filed to the Supplemental Intermediate Report. This time the Board chose to purportedly follow the statutory provisions[6] and enter its order because of the fact that no statement of exceptions had been filed. It accordingly, adopted the Supplemental recommendations as its Order. [R. 88-91.] It gave no reason why it failed to follow the statute[7] and enter the original Intermediate Report and Recommendations as its Order, upon the failure of the parties to file exceptions to those findings and recommendations.

The National Labor Relations Board, pursuant to Section 10(e) of the Labor-Management Relations Act of 1947[8] petitioned the United States Court of Appeals for the Ninth Circuit for a decree enforcing the Order of the Board. [R. 91-96.]

The Court below granted a decree of enforcement of the Order of the National Labor Relations Board, one judge dissenting. [R. 100-110.] Relying chiefly on *Polish National Alliance v. N.L.R.B.*, 322 U. S. 643, and *Williams Motor Car Company v. N.L.R.B.*, 128 F. 2d 960 (C. A. 8), that Court held that, even though petitioner made all his purchases and sales within the State of California, he was, nevertheless, subject to the Labor-Management Relations Act of 1947, because the Board had held the new automobiles which petitioner sold had originated outside of that state, a finding the

---

[6]29 U. S. C. 160(c) (Supp. 1949).

[7]*Id.*

[8]29 U. S. C. 160(e) (Supp. 1949).

Board made possible by a process of judicial notice which the lower court stamped as questionable. [R. 101.] The matter judicially noticed consisted of a finding, in a prior case to which petitioner was not a party and had no notice thereof, that Hudson Sales Corporation obtained new Hudson automobiles from sources outside the State of California; the Hudson Sales Corporation being the only source of petitioner to acquisition of such new automobiles. The Court noted that purchases of such new automobiles was relatively small and that petitioner's business was not large [R. 104] but stated that to hold petitioner was beyond the Board's jurisdiction would allow countless like retailers of new automobiles to engage in unfair labor practices with impunity, a holding not supported by any evidence in the record. It supported this conclusion by *Williams Motor Car Co. v. N.L.R.B., supra,* which is inapposite for the reason that the Williams Company received in interstate commerce shipments of the automobiles which it retailed.

Judge Stephens, dissenting, was of the opinion that the evidence did not sustain the conclusion that petitioner's business affected commerce. He stated that to so hold would bring all indefinite, remote and possible effects upon commerce within the ambit of the Labor-Management Relations Act of 1947 and render interstate commerce an indistinct thing capable of swallowing up all predominantly local businesses, and thus subject all to federal control. [R. 106-107.]

Petitioner had raised the question of the propriety of the taking of judicial notice, by the Board in the manner

in which it did, but the lower court disposed of this question on the ground that petitioner had not objected to such procedure before the Board, overlooking the extraordinary circumstances which surrounded the objection to action.

The incompleteness of the record upon review was brought to the attention of the Court below. The record in the *Hudson Sales Corporation* case was not certified, by the Board, to the Court below, as Section 9(d) of the Labor-Management Relations Act of 1947, requires.[9] That section provides that

> "whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under Section 10(e) . . ."

The Court below totally ignored such requirement.

The Court below also overruled petitioner's contention that the Board was mandated by Section 10(c) (*supra*) of the Labor-Management Relations Act of 1947 to enter the original Intermediate Report and Recommendations because no exceptions or objections had been filed as provided by law.

---

[9]29 U. S. C. 159(d) (Supp. 1949).

Specification of Errors to Be Urged.

1. The Court below erred in holding that the National Labor Relations Board, without request to do so by any of the parties, can take judicial notice of a prior case in which petitioner was not a party.

2. The Court below erred in holding that the National Labor Relations Board may supplement deficiencies in the trial record by the process of judicial notice without complying with the statutory provisions of the Labor-Management Relations Act of 1947.

3. The Court below erred in holding that the Labor-Management Relations Act of 1947 is applicable to petitioner, a franchised retail automobile dealer who buys and sells all of his merchandise within the boundaries of the State of California.

4. The Court below erred in holding that it may decide a case, such as here presented without, having a full record before it, as required by the Labor-Management Relations Act of 1947.

5. The Court below erred in holding that the National Labor Relations Board is not conclusively bound by the Intermediate Report and Recommendations of its Trial Examiner, when no such exceptions to such report and recommendations have been filed by the parties within the time allowed by the statute or the time as extended by the National Labor Relations Board.

5. The Court below erred in holding that the National Labor Relations Board had afforded petitioner the requisite due processes of the law.

REASONS FOR GRANTING THE WRIT.

I.

The Conflict of Decision on Question of Judicial Notice.

1. The decision of the Court below in holding that the National Labor Relations Board legally and properly took judicial notice of findings it had made in a prior case to which petitioner was not a party and had no notice thereof conflicts with decisions on similar subjects by other courts of appeal. In *Divide Creek Irrigation Dist. v. Hollingsworth*, 72 F. 2d 859, the Court of Appeals for the Tenth Circuit had before it the propriety of the District Court's taking judicial notice of matters in prior cases between the same parties. The District Court, relying on matters decided in those prior cases, without requiring that they be introduced into the evidence of the case reviewed, entered its judgment. The tenth circuit held that trial courts may not thus take judicial notice of prior cases. The appellate court stated that trial courts' judgments are subject to review and in order to review them, a record of the proceedings in that case must be made for an appellate court which cannot take judicial notice of the records of every district in its jurisdiction. The Court further stated that questions of *res adjudicata* are often close and disputable, and adversaries ought to be notified of the plea and afforded an opportunity to meet them. Therefore, it said, that in a trial court a claim of *res adjudicata* must be pleaded, and if traversed, proof thereof must be made.

In the instant case there was a complete departure from the rule laid down in the *Divide Creek* case. The Board acted summarily and without request. The matter noticed was not entered into the record of the cause and the

Board did not even follow the statutory requirements for the taking of further evidence. Section 10(c) provides that where the evidence is taken before an agent of the Board, it shall be reduced to writing and filed with the Board. Thereafter, the Board in its discretion may take further evidence but only after notice is given to the parties. (See Appendix.) The Board gave no notice to any one of its proposal to take judicial notice of its findings in the prior case and foreclosed its Trial Examiner from making contrary findings based upon the record before him. This action the lower court sustains in direct conflict with the rule of taking judicial notice as laid down by the tenth circuit in the *Divide Creek* case.

The Court of Appeals for the Seventh Circuit, in *Paridy v. Caterpillar Tractor Company*, 48 F. 2d 166, cert. den. 278 U. S. 617, reached an almost identical conclusion as the tenth circuit did in the *Divide Creek* case. The seventh circuit held that a trial court must depend upon the evidence introduced into the record and not that which it may choose to supplement the deficiencies of the record before it; that the trial court could not resort to other cases to fill the gaps in the evidence. This decision the Court below also refused to follow.

In the instant case there was no pleading of the prior case as determinative of anything in the case at bar. Not only did trial counsel not introduce relevant portions of the prior case, but he declined to do so, electing to stand on the evidence which he had adduced as being sufficient to prove the question of the Board's jurisdiction.

The Court below, while terming the process of taking judicial notice, as the Board did, questionable, declined to follow its own decision in *National Surety Co. v. U. S.*, 29 F. 2d 92, in which it had reached similar results as were reached in the *Divide Creek* and *Paridy* cases.

II.

The Commerce Issue the Conflicts of Decisions.

2. There is a direct conflict between the decision of the Court below and the decision of the Court of Appeals for the Tenth Circuit in *N.L.R.B. v. Shawnee Milling Co.*, 184 F. 2d 57 (1950). The tenth circuit had before it an identical consideration with respect to the Board's jurisdiction, as was presented to the Court below. In the *Shawnee* case. the Shawnee Company owned and operated a flour mill and facilities at Shawnee, Oklahoma and products of which were shipped in interstate commerce. In addition it had a plant at Pauls Valley, Oklahoma, which was operated by a manager in complete control subject only to the overall policies and supervision by the officer of the Shawnee Company at Shawnee, Oklahoma, including all labor policies. All materials used by the Paul's Valley plant were purchased within the State of Oklahoma and all of that plant's products were sold and distributed within that state. Upon these facts the tenth circuit concluded that they did not warrant a holding the Paul's Valley plant to be within the Board's jurisdiction and the Court refused to enforce an order of the Board.

In the case at bar, like the *Shawnee* case, all purchases and sales of petitioner were admittedly made within the confines of the State of California. Whereas, the Paul's Valley plant was an integral part of the Shawnee Company, petitioner is an entity, separate and apart from either the Hudson Sales Corporation or the Hudson Motor Car Company. In the *Shawnee* case, the branch was subject to the overall policies and supervision, including labor policies, of the Shawnee Company. Petitioner is not so subjected to the supervision or policies of anyone

other than himself. Neither Hudson Sales Corporation nor Hudson Motor Car Company has any right of ownership, management or control of petitioner. He may sever his connection with Hudson Sales Corporation at will with or without reason.

As the tenth circuit pointed out in the *Shawnee* case, there is nothing in the instant record which warrants the majority below in reaching the conclusion that petitioner's business, "due to a strike, caused by unfair labor practices, would inevitably decrease the number of automobiles brought from without the state by the Hudson Sales Corporation." This conclusion is highly speculative and the majority below admit that any such decrease would be relatively small and that petitioner's business is not large. [R. 104.] This conclusion of the majority is sharply challenged by the dissenting judge who points out that the majority's conclusion, as applied to petitioner, is unwarranted by the record before the Court below.

III.

The Misapplication of the Decisions of This Court.

3. The decision of the Court below is believed to be erroneous and moreover, probably conflicts with the applicable decisions of this Court. It is generally conceded that the decisions of this Court in *Ohio Bell Telephone Co. v. Interstate Commerce Commission,* 301 U. S. 292; *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U. S. 88, and *United States v. Abilene & Southern R. Co.,* 265 U. S. 274, laid down the rule to be followed by administrative agencies in noticing matters not a part of a record and prescribed the limits beyond which such administrative agencies may not go.

The *Ohio Bell* case, the most recent of these three decisions, bore directly upon the powers of an administrative agency to take judicial notice of matters in its files but which were not introduced into the evidence of the case under review by this court. Mr. Justice Cardozo, for the court, stated that the province of judicial notice rested in a large part on the notoriety of the matters noticed and that judicial notice when taken has no other effect than to relieve one of the parties to the controversy of the burden of resorting to the usual forms of evidence, but, he said, that does not mean that the opponent is prevented from disputing the matter by evidence if he believes the matter disputable. To press the doctrine of judicial notice as was done in the *Ohio Bell* case and as here, and to do it retroactively after the case had been submitted, in the words of Mr. Justice Cardozo, turns the doctrine into a pretext for dispensing with a trial.

Mr. Justice Cardozo, in the *Ohio Bell* case further states:

> "What has been done by the [Board] is subject to an objection even deeper . . . There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particulars or the evidential facts of which the [Board] took judicial notice and on which it rested its conclusions. Not only are the facts unknown there is no way to find them out . . . Even if they are copied in the findings without preliminary

proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. That opportunity is excluded here. The [Board's] withholding from the record the evidential facts (merely pointing out that we once did something and they teach us so and so) will never do if hearings and appeals are to be more than empty form."

Further Justice Cardozo declared:

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirements have been neglected or ignored."

Tested by the doctrine thus delineated, we find in the case before this court an arbitrary and summary action of the Board in taking of judicial notice. It is also significant that the Board took judicial notice only of its conclusions in the case noticed, but did not afford an examination of the facts upon which it had based those conclusions. The court below did not have before it the evidence upon which the Board rested its conclusion that the Hudson Sales Corporation was engaged in a business affecting commerce but "assumed" that the automobiles originated out of the state of California. As has been pointed out above, the Board did not certify to the court below the record or evidence in the *Hudson Sales* case, and the lower court disposed of the subject without having an opportunity of observing the propriety of the investigation or the correctness of the

conclusions drawn by the Board. We suggest that the actions of the court below did not conform to the pattern which Mr. Justice Cardozo so clearly outlined in the *Ohio Bell* case. Rather, it seems, the court below gave no proper consideration or weight to that decision.

Further, the court below, apparently holds that the Board may make use of information which it has in its files and which it feels is necessary to enable it to perform its functions and duties and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. In *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, this court dealt with a similar contention and found it to be without merit. The court there said in this connection:

> "But such a contention would nullify the right to a hearing—for manifestly there is no hearing when a party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute it . . . In such cases the [Board] cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered and must be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. *In no other way* can it test the sufficiency of facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the [Board] had be-

fore it extraneous, unknown, but presumptively sufficient information to support the findings. (Citing U. S. v. Baltimore & Ohio S. W. R. Co., 226 U. S. 14.)"

The court below disposes of these imperative authorities upon the grounds that petitioner did not except to the action of the Board. In doing so it seems to overlook the fact that only the conclusions were noticed and not the evidentiary facts and the further fact that the Board had made its decision on the subject without having afforded petitioner an opportunity to object to either the procedure or the matters noticed. The finality of the Board's action is shown by its remand to the Trial Examiner and the foreclosing of the Trial Examiner to make findings, on the commerce question, which he, in his own judgment, might choose to make, independently of the Board's fiat. When these considerations are coupled with the statutory command to the Board to first give notice to the parties prior to a supplementation of the record,[10] the incorrectness of the lower court's decision and the probable conflict with the applicable decisions of this court become glaringly revealed.

Both *Ohio Bell* and *Louisville & Nashville* cases emphasize the duty of the reviewing court to discover such improper actions and to protect the rights of the individual against such arbitrary abuses of power.

---

[10]29 U. S. C. 160(c) (Supp. 1949).

IV.

The Incompleteness of the Record Below.

4. There is a further probable conflict with the decision of this court in *N.L.R.B. v. Foote Bros. Gear & Machine Corp.*, 311 U. S. 620, in which this court reversed and remanded that case to the court of appeals for the seventh circuit with directions to determine the question presented upon a record as required by the provisions of the National Labor Relations Act. In the instant matter, the Board was required, by Section 9(d) of the Labor-Management Relations Act of 1947[11] to certify to the court of appeals the record in the *Hudson Sales* case because the Board had based, in part, its order in the instant case upon facts purportedly ascertained by the investigation of the *Hudson Sales* case. In such circumstances the National Labor Relations Board, upon its petition for review of such an order, must send up the record for both cases so that the appellate court may have before it the complete factual records for review. Here, as in the *Foote Bros.* case no complete record, as required by the statute was presented to the reviewing court. In *Foote Bros.* case there was a narrative form of the record, admittedly complete, but it did not conform to the record which the statute required and therefore, this court sent the case back to be decided upon a record which satisfied the statutory requirement. Here there is no complete record. The determinative facts are being withheld from the court by the failure of the National Labor Relations Board to send up the record in the *Hudson Sales* case.

---

[11]29 U. S. C. 159(d) (Supp. 1949).

V.

The Importance of the Questions Nationally.

5. Clearly, the questions presented are of importance in the administration of the Labor-Management Relations Act of 1947. The decision of the court below, if left to stand will affect approximately 40,000 franchised retail automobile dealers, similarly situated and located throughout the various states of the United States. There have been within the last year, approximately 50 cases,[12] decided by the Board involving approximately 100 retail automobile dealers, similar to petitioner, and in a majority of these cases the jurisdiction of the Board over each of them has been sharply challenged. These cases are now in varying stages before the Board or in the process of being presented to other courts of appeals to determine the jurisdictional question.

---

[12] *Matter of Angelus Chevrolet Co.*, 88 N.L.R.B. No. 174; *Matter of Bill Heath*, 89 N.L.R.B. No. 12; *Matter of Dependable Motors*, 87 N.L.R.B. No. 193; *Matter of Fuller Automobile Co.*, 88 N.L.R.B. No. 245; *Matter of Given Motors, Inc.*, 87 N.L.R.B. No. 160; *Grace Motor Sales*, 88 N.L.R.B. No. 90; *Matter of Master's Pontiac Co., Inc.*, 88 N.L.R.B. No. 175; *Matter of Pasco Auto Co.*, 87 N.L.R.B. No. 113; *Matter of Strickler Motors*, 87 N.L.R.B. No. 113; *Matter of Reesmyer Motor Co.*, 88 N.L.R.B. No. 152; *Matter of Watts Motor Co.*, 87 N.L.R.B. No. 23; *Matter of Allen W. Fleming Co.*, 90 N.L.R.B. No. 118; *Matter Jefferson Lincoln-Mercury*, 90 N.L.R.B. No. 284; *Matter of Cadillac Automobile Co. of Boston*, 90 N.L.R.B. No. 85; *Matter of Coulter Jones & Sons*, 89 N.L.R.B. No. 136; *Matter of Dunlop Chevrolet*, 91 N.L.R.B. No. 172; *Matter of Earl McMillan, Inc.*, 90 N.L.R.B. No. 250; *Matter of Earl Severin, Inc.*, 90 N.L.R.B. No. 24; *Matter of Gilbert & Siebel Motors*, 20 C. A. 232, Apr. 28, 1950; *Matter of Green Bay Auto Parts Co.*, 91 N.L.R.B. No. 128; *Matter of Howell Chevrolet*, 89 N.L.R.B. No. 142; *Matter of Ivy-Russell Motor Co.*, 90 N.L.R.B. No. 260; *Matter of Lewiston Buick Co.*, 1 C. A. 498, July 17, 1950; *Matter of Massachusetts Motor Car Co.*, 90 N.L.R.B. No. 186; *Matter of McConeca Motors*, 90 N.L.R.B. No. 202; *Matter of Public*

In addition, the Board is citing this case as its authority, to sustain its various practices of judicial notice taking in matters subsequently considered by the Board and its Trial Examiners.

Settlement of the questions here presented, by this court is plainly in the public interest since they or some of them are likely to be presented in almost all of the cases involving franchised retail automobile dealers and in cases where the National Labor Relations Board assumes to take judicial notice to supplement deficiencies in the trial records.

It is also, in the public interest, to have set at rest, the finality of a Trial Examiner's Intermediate Report and Recommendations in the event no exceptions or objections are taken to such document. So far as we have been able

---

Motors, 90 N.L.R.B. No. 273; *Matter of Rowan Motors Co.,* 90 N.L.R.B. No. 156; *Matter of Sheeley Motor Sales,* 89 N.L.R.B. No. 184; *Matter of Teague Motor Co.,* 91 N.L.R.B. No. 177; *Matter of University Motors,* 89 N.L.R.B. No. 146; *Matter of Baxter Bros.,* 91 N.L.R.B. No. 233 (Nov. 6, 1950); *Matter of Knapp Chevrolet Co.,* 91 N.L.R.B. No. 217 (Oct. 31, 1950); *Matter of Port Angelus Automobile Dealers,* 91 N.L.R.B. No. 206 (Oct. 31, 1950); *Matter of Anders Motors Company, Inc.,* 92 N.L.R.B. No. 124 (Dec. 15, 1950); *Matter of Tuscaloosa Lincoln-Mercury Co.,* 92 N.L.R.B. No. 132 (Dec. 14, 1950); *Matter of Tuscaloosa Truck & Tractor Co.,* 92 N.L.R.B. No. 133 (Dec. 14, 1950); *Matter of Harbor Chevrolet Co.* (not reported); *Matter of Wray Bros.* (not reported); *Matter of Adams Motors, Inc.,* 80 N.L.R.B. No. 1518; *Matter of Lawrence Holbrook,* 80 N.L.R.B. No. 1679; *Matter of Liddon-White Truck Co., Inc.,* 76 N.L.R.B. No. 1181; *Matter of Belle-Wyman Co.,* 79 N.L.R.B. No. 1424; *Matter of Harry's Cadillac-Pontiac Co.,* 81 N.L.R.B. No. 1; *Matter of Jack Taylor,* 85 N.L.R.B. No. 1336; *Matter of Rome Lincoln-Mercury Corp.,* 86 N.L.R.B. No. 387; *Matter of Rowan Motors Co.,* 90 N.L.R.B. No. 186.

to ascertain, this question has not been decided by this court, and while the question is novel, it is, undoubtedly, important in the administration of the Labor Management Relations Act of 1947.

Section 10(c) *supra* provides in part:

> "In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member or such examiner or examiners, as the case may be, *shall* issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon the parties, or within such further time as the Board may, authorize, *such recommended order shall become the order of the Board and become effective as therein prescribed.*" (Emphasis added.)

The *Administrative Procedure Act, supra,* contains a similar requirement. Section 8 of that act provides in part as follows:

> "Section 8. In cases in which a hearing is required to be conducted in conformity with section 7—(a) Action by Subordinates.—. . . Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency."

Admittedly, the Trial Examiner's Original Intermediate Report and Recommendations called for the dismissal of the complaint against petitioner on the grounds that there was a failure to prove by evidence the jurisdiction

of the Board over petitioner. Also, admittedly, no exceptions were filed by any of the parties to such Intermediate Report and Recommendations, although the Board kept the time open for nearly four months. Petitioner contended below, that the failure to file exceptions to this Intermediate Report and Recommended Order entitled him to have the Board enter the Trial Examiner's Recommended Order as the Order of the Board and hence a dismissal of the complaint. Petitioner contended that in the absence of such exceptions the Board had no choice but to follow the statutory mandate, because the statute clearly stated that the Recommended Order *shall become the order of the Board and become effective as therein prescribed.* [R. 111-112.] Not only is this a requirement of Section 10(c) of the Labor-Management Relations Act but is also a requirement of Section 8 of the Administrative Procedure Act, *supra,* which states that upon the failure to except, "such decision *shall* without further proceedings, become the decision of the agency."

The Court below denied this contention on the ground that such would not constitute a final adjudication in the proceeding. [R. 117.]

It is believed that the lower court erred, in this respect, and does not give to these statutes the effect which the Congress intended. It seems plain that the Congress intended orders entered under these statutory requirements to be final orders of the Board, "without further proceedings" or else the words of Congress are meaningless. The word "shall" as used in both the Labor-Management Relations Act and the Administrative Procedure

Act is not a dispensation of discretion. It is a command. The lower court says that even assuming the correctness of this contention, Section 10(d)[13] reposes jurisdiction in the Board to, *upon reasonable notice* "modify or set aside, in whole or in part, any finding or order made or issued by it." But the Board did not enter the original Intermediate Report and Recommended order as its order and even though it had, it seems from the language used by Congress, no intention of that body was given to the Board to set aside the clear statutory requirements.

Petitioner was, therefore, entitled to an order of dismissal, "without further proceedings."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE J. NICOSON,
FREDERICK A. POTRUCH,
FINDLAY A. CARTER,
Counsel for Petitioner.

---

[13]29 U. S. C. 160(d) (Supp. 1949).

APPENDIX.

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.* (Supp. 1949)) are as follows:

"DEFINITIONS.

"Sec. 2. When used in this Act—

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"PREVENTION OF UNFAIR LABOR PRACTICES.

"Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. . . .

"(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed

with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. . . .

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia) or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined

therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for a leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that

the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon a writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"REPRESENTATIVES AND ELECTIONS.

* * * * * * * * *

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript."

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1005 *et seq.* (Supp. 1949) are as follows:

"ADMINISTRATIVE PROCEDURE ACT.

"Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. *Whenever such officers make the initial decision* and *in the absence of either an appeal to the agency* or review upon motion of the agency *within time provided by rule, such decision shall without further proceedings then become the decision of the agency.* On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. *Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision* except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds that upon the record that the timely execution of its functions imperatively and unavoidably so requires."

"NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS

Series 5

and

STATEMENTS OF PROCEDURE

As Amended August 18, 1948

LABOR MANAGEMENT RELATIONS ACT, 1947

Exceptions to the Record and Proceeding

"Sec. 203.46. ***Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.***—

"(a) Within 20 days or within such further period as the Board may allow from the date of service of the order transferring the case to the Board, pursuant to section 203.45, any party may file with the Board in Washington, D. C., an original and six copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with the original and six copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file an original and six copies of a brief in

support of the intermediate report and recommended order, copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties.

"(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings.

"PROCEDURE BEFORE THE BOARD.

"Sec. 203.48. *Action of Board upon expiration of time to file exceptions to intermediate report.*—(a) In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes."